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No. 01-584

In the Supreme Court of the United States

WANDA ADAMS, *et al.*

Petitioners,

v.

FLORIDA POWER CORPORATION and
FLORIDA PROGRESS CORPORATION,

Respondents.

ON A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF *AMICUS CURIAE* OF ATLANTIC LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*

Atlantic Legal Foundation is a non-profit, non-partisan, 501(c)(3) public interest law firm whose mandate is to advocate and protect the principles of limited government, the free-market system and individual rights. [1,2] ALF seeks to advance these goals

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[1] Letters from all parties consenting to the filing of this brief have been filed with the Clerk of this Court.

[2] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that this brief was not prepared, written, funded or produced by any person or entity other than the *amicus curiae* or its counsel.

through litigation and public advocacy, and education. Its interest in this case derives from its concern that use of "disparate impact" theory of employment discrimination to the Age Discrimination in Employment Act ("ADEA") and other statutes that affect the employment relationship will unduly interfere with employers' reasonable economic decisions, will distort the marketplace, and will adversely affect the rights of employees who are not in the "protected class."

QUESTION PRESENTED

Is the disparate impact method of proving employment discrimination available to plaintiffs suing under the Age Discrimination in Employment Act?

SUMMARY OF ARGUMENT

Disparate impact theory is not a viable theory of liability under ADEA because the statutory language does not explicitly provide for disparate impact liability and the policies underlying the ADEA, of prohibiting employers from acting upon assumption that productivity and competence decline with old age, are not implicated in disparate impact cases. The subsequent history of the ADEA and of Title VII show that Congress did not intend the ADEA to create a claim for liability based on disparate impact. This Court has never held that discrimination must always be inferred from different impacts on different employees or groups of employees of a firm's employment policy, and it should not do so absent explicit Congressional intent. The judicial creation of disparate impact liability would have unintended consequences of encouraging employers to adopt quotas and preferences, and distort market-based rational economic decisions.

I. NEITHER THE LANGUAGE NOR THE LEGISLATIVE HISTORY OF THE ADEA SUGGESTS THAT A DISPARATE IMPACT CAUSE OF ACTION LIES

This Court recognized in *Watson v. Fort Worth Bank*, 487 U.S. 977, 991 (1988) that there is a reasonable concern on the part of employers that

> a plaintiff may establish a prima facie case of disparate impact through the use of bare statistics, and that the defendant can rebut this statistical showing only by justifying the challenged practice in terms of "business necessity," *Griggs*, 401 U.S., at 431, 91 S.Ct., at 853, or "job relatedness," *Albemarle Paper Co.*, 422 U.S., at 426, 95 S.Ct., at 2375. Standardized tests and criteria, like those at issue in our previous disparate impact cases, can often be justified through formal "validation studies. . ."

The disparate impact theory makes it likely that any employer who had a segment of his work force that was "imbalanced" by race, gender or age could be forced to engage in the expensive and time-consuming task of defending the "business necessity" of the methods used to select the members of its work force. "The only practicable option for many employers would be to adopt. . .quotas, insuring that no portion of their work forces deviated in. . .composition from the other portions thereof. . . ." and would ". . .leave the employer little choice. . .but to engage in a subjective quota system of employment selection." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 449 (1975) (Blackmun, J., concurring in the judgment).

The "inevitable focus" on statistics in disparate impact cases puts undue pressure on employers to adopt measures to make sure that their employment practices can withstand disparate impact analysis which will "create a Hobson's choice for employers and thus to lead in practice to perverse results." *Watson*, 487 U.S. at 993. Quotas and preferential treatment for "protected" classes will become the only cost-effective means of avoiding expensive litigation, and already such measures have been widely adopted. Employers will seek to ensure that their employment policies are described in euphemistic terms, but will be ensure that "diversity" quotas are met.

The spread of disparate impact analysis has led to this result, but is contrary to Congress' clearly expressed intent:

> "Nothing contained in [Title VII] shall be interpreted to require any employer ... to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer ... in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area." 42 U.S.C. § 2000e-2(j).

487 U.S. at 992. See also *Albemarle Paper*, 422 U.S. 405, 449 (1975) (Blackmun, J., concurring). In *Watson*, this Court rightly

expressed a concern that extension of the disparate impact theory can increase the risk that employers will be given incentives to adopt quotas or to engage in preferential treatment. Petitioners do not suggest that this has not, in fact, has happened in the labor market.

This case provides the Court with an opportunity to limit the spread of the use of quotas and preferential treatment, and we urge that the statutory language of the ADEA and its legislative history warrant such a limitation.

While this Court did not expressly decide the viability of disparate impact liability under the ADEA in *Hazen Paper v. Biggins*, 507 U.S. 604 (1993), it noted that disparate treatment "captures the essence of what Congress sought to prohibit in the ADEA." *Hazen*, 507 U.S. at 610. The Court reasoned that the enactment of the ADEA was prompted by Congress' concern that older workers were being deprived of employment on the basis of "inaccurate and stigmatizing stereotypes." *Id.*

This emphasis in *Hazen* on the Congressional purpose behind the ADEA is particularly significant, and we submit compels the conclusion that the ADEA does not provide for a cause of action where plaintiff pleads only "disparate impact" and cannot show disparate treatment or discriminatory intent.

The language of the ADEA does not explicitly provide for disparate impact liability. Section 623(a)(2) makes it "unlawful for an employer . . .(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age. . . ." Petitioners and their supporters argue that the language

quoted above parallels the language in Title VII, and that because this Court's decision in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) interpreted Title VII to permit a plaintiff to prevail on a "disparate impact" theory, that theory is also available in ADEA cases.

When this Court found disparate impact liability under Title VII in *Griggs*, it relied not on any specific statutory language but on the "policies" underling Title VII[3]:

> The objective of Congress in the enactment of Title VII. . .was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices.

Id. at 429-30[4].

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[3] Congress enacted the ADEA before *Griggs*, and obviously could not have intended literally to incorporate Griggs' "disparate impact" theory to the ADEA by incorporating language from Title VII. Thus, the relevant inquiry is whether the factors that prompted the Court in *Griggs* to recognize disparate impact claims in Title VII apply to the ADEA. *Griggs* did not base its holding on the text of Title VII, but rather looked primarily to the larger objectives underlying Congress' enactment of Title VII. *See Griggs*, 401 U.S. at 429-30; *see also* Michael C. Sloan, "Disparate Impact in the Age Discrimination in Employment Act," 1995 Wis.L.Rev. 507, 517 (1995) ("[T]he *Griggs* Court did not analyze statutory language to justify its decision, but instead relied on its interpretation of congressional intent and legislative history.").

[4] As this Court noted in the plurality opinion in *Watson v. Fort Worth Bank*, 487 U.S. 977 at 987, in *Griggs* the employer had a history of "overt racial discrimination" that predated the enactment of the Civil Rights Act of 1964 and the employer's "requirements operate[d] to disqualify Negroes at a substantially higher rate than white applicants." (Citing *Griggs*, 401 U.S. at 426, and "the employer continued to follow employment policies that had 'a markedly disproportionate' adverse effect on blacks. *Id.* at 428-429."

This "policy" cannot be said to underpin the ADEA, the primary purpose of which is to prohibit employers from acting upon the assumption that "productivity and competence decline with old age." *Hazen*, 507 U.S. at 610. In *Griggs*, the critical fact was the link between the history of educational discrimination and the use of that discrimination as a means of disadvantaging African-Americans in the present. There is no similar history of discrimination based on age.

Congress itself used distinct language in the two statutes. In the ADEA, unlike in Title VII, it provided that "[i]t shall not be unlawful for an employer ... to take any action otherwise prohibited [by this section] where the differentiation is based on reasonable factors other than age...." 29 U.S.C. § 623(f)(1). [emphasis supplied] "The sentence is incomprehensible unless the prohibition forbids disparate treatment and the exception authorized disparate impact." *Metz v. Transit Mix, Inc.*, 828 F.2d 1202, 1220 (7th Cir.1987) (Easterbrook, J. dissenting) (quoting Douglas Laycock, *Continuing Violations, Disparate Impact in Compensation, and Other Title VII Issues*, 49 L. & Contemp. Prob. 53, 55 (Aug.1986) (referring to identical language of Equal Pay Act)). The use of this statutory language evidences

Congressional recognition that neutral policies not motivated by discriminatory intent may be permissible employment practices.[5]

The critical difference in the language of the ADEA and Title VII is persuasive evidence that a disparate impact cause of action does not lie under the ADEA. This proviso permits employers to utilize factors other than age as grounds for employment-related decisions that differentially impact members of the protected class (individuals between the ages of 40 and 69). If the exception contained in section 623(f)(1) does not preclude disparate impact liability, it is "nothing more than a bromide to the effect that "only age discrimination is age discrimination." *Mullin v. Raytheon Co.*, 164 F.3d 696, 702 (1st Cir. 1999), *cert denied*, 528 U.S. 811 (1999).

A similar provision in the Equal Pay Act which permits discrepancies in wages paid to male and female workers for "factors other than sex," has been construed to preclude disparate impact claims. *County of Washington v. Gunther*, 452 U.S. 161, 170-71 (1981). In *County of Washington v. Gunther*, this Court compared this limitation on Equal Pay Act liability with Title VII's broadly inclusive prohibition against gender-based discrimination and concluded that the limiting language worked to "confine the application of the Act to wage differentials attributable to sex discrimination." *Gunther*, 452 U.S. at 170, and held that the Equal Pay Act "has been structured to permit employers to defend against charges of discrimination where their pay differentials are based on a bona fide use of 'other factors other than sex'." *Id.;*

[5] The ADEA was not intended "to protect older workers from the often harsh economic realities of common business decisions and the hardships associated with corporate reorganizations, downsizing, plant closings and relocations." *Allen v. Diebold, Inc.*, 33 F.3d 674, 677 (6th Cir. 1994).

see also City of Los Angeles v. Manhart, 435 U.S. 702, 710 n. 20, 713 n. 24, 98 S.Ct. 1370, 55 L.Ed.2d 657 (1978) (reasoning that the Equal Pay Act's "other factors other than sex" exception precludes liability based on disparities caused by independent factors). This reasoning suggests that the exception eliminates disparate impact as an available theory of liability under both the Equal Pay Act and the ADEA

The ADEA was, of course, enacted before *Griggs* was decided, and it cannot be said that Congress had in mind the judicial gloss that found the possibility of "disparate impact" liability lurking in the language of Title VII when it crafted the language of the ADEA. However, the post-*Watson* and *post-Wards Cove v. Atonio*, 490 U.S. 642 (1989) legislative history is suggestive. In 1990, in reaction to the strictures placed on "disparate impact" liability by the Court, Congress passed the Civil Rights Act of 1990. As one of Petitioners' *amici* describes it "Congress spent enormous energy addressing the doctrine [of disparate impact] and its implications under Title VII." *See* Brief of Amicus Curiae The Academy of Florida Trial Lawyers at 16-17. The 1990 Act "would have restored the disparate impact doctrine after the *Wards Cove* decision." *Id.* at 17. President Bush vetoed the 1990 Civil Rights Act.

In 1991, Congress amended Title VII to provide explicitly for causes of action based upon disparate impact. *See* Pub.L. No. 102-166, § 105, 105 Stat. 1071, 1074-75 (1991). It simultaneously amended the ADEA in numerous respects, *see, e.g., id.* at § 115, 105 Stat. at 1079[6], but it did not adopt language paralleling the Title VII amendments which explicitly created a

[6] *See, e.g.*, § 115, 105 Stat. at 1079 (amending the time period within which an employee may file civil actions); § 302(2), 105 Stat. at 1088 (extending coverage of ADEA to congressional employees).

disparate impact cause of action. We submit that this difference indicates its intent not to provide for a corresponding disparate impact cause of action under the ADEA.

While courts ordinarily should be careful in basing statutory interpretation on the inaction of subsequent Congresses, *see, e.g., Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 306, (1988), Congressional action with respect to a statute in a later legislative session can be a source of guidance in statutory interpretation cases, *see, e.g., Andrus v. Shell Oil Co.*, 446 U.S. 657, 666 n.8 (1980); *Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 596 (1980). Congress "was no stranger to the disparate impact doctrine" (*see* Brief of Amicus Curiae The Academy of Florida Trial Lawyers at 16) and its inclusion of an express provision for a disparate impact cause of action in Title VII and its failure to adopt such a provision in the ADEA, which was being amended at the same time by the same committees and in the same bill is significant. That Congress knew full well how to include a disparate impact cause of action in the ADEA had it wished to do so[7].

[7] The brief of Academy of Florida Trial Lawyers goes a large step further, and attempts to divine the mind of Congress, speculating (without any citation to legislative proceedings) that "Congressional attention in 1990 was focused on overruling specific Supreme Court and EEOC decisions." Brief of Academy of Florida Trial Lawyers at 18.

CONCLUSION

Disparate impact claims often have insidious consequences, propelling employers to adopt quotas and preferential treatment, to the disadvantage of persons not in a "protected class" and distorting decisions based on sound economic or other business reasons. This was not the intent of Congress.

The ADEA and Title VII diverge structurally in an important way. This divergence and subsequent Congressional action are persuasive indications that Congress never intended to make a disparate impact cause of action available under the ADEA.

For these reasons, we respectfully urge that the decision of the Court of Appeals for the Eleventh Circuit be affirmed.

February 25, 2002

Respectfully submitted,

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Certificate of Service

Martin S. Kaufman, an attorney admitted to practice before the bar of this Court, hereby declares under penalty of perjury that two copies of the foregoing brief of *amicus curiae* Atlantic Legal Foundation in support of the respondent were served on the following counsel of record for the parties on the 25th day of February, 2002, by depositing same in a postal depository box under the care of the United States Postal Service, in a properly addressed, first class postage prepaid envelopes addressed to them at:

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